In the Supreme Court
OF THE
United States

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OCTOBER TERM, 1951

No. 433

RUSSELL GIFFEN,
Petitioner,
vs.
COMMISSIONER OF INTERNAL REVENUE,
Respondent,
and
RUTH P. GIFFEN,
Petitioner,
vs.
COMMISSIONER OF INTERNAL REVENUE,
Respondent.

PETITION FOR WRIT OF CERTIORARI
to the United States Court of Appeals for the Ninth Circuit.

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To the Honorable Fred M. Vinson, Chief Justice of the United States, and to the Honorable Associate Justices of the Supreme Court of the United States:

Russell Giffen and Ruth P. Giffen pray that a writ of certiorari issue to review the judgments entered in these cases (consolidated below) on June 22, 1951, by the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW.

The opinion of the United States Tax Court (R. 191) is reported at 14 T.C. 1272. The opinion of the Court of Appeals (R. 286) is reported in 190 F. (2d) 188.

JURISDICTION.

The judgments of the Court of Appeals for the Ninth Circuit were entered on June 22, 1951 (R. 292, 293). A petition for rehearing filed on July 17, 1951 (R. 294) was denied on August 23, 1951 (R. 294). The jurisdiction of this Court is invoked under the provisions of 28 U.S.C. 1254(1) and Section 1141(a) of the Internal Revenue Code.

QUESTIONS PRESENTED.

1. Is a gift of income-producing real and personal farming property sufficiently complete to allow the income from such property to be taxed to donee children for Federal income tax purposes, where the donor, Petitioner Ruth P. Giffen, retained no control over or benefit from the donated property but became a limited partner along with the donee children, where the gifts were made by delivered and recorded deeds and assignments conditioned on the consent of the guardianship Court to the investment of the gift property in a limited partnership and such consent was given, where the property given by Ruth P. Giffen to each of four children was an undivided one-sixteenth of a one-half interest in valuable farming land and equipment subject to that proportion of a heavy indebtedness and where Federal and California gift tax returns were filed and gift tax was paid?

2. Is a gift of income-producing real and personal farming property sufficiently complete to allow the income from such property to be taxed to donee for Federal income tax purposes, where the donor, Petitioner Russell Giffen, had, over the donated property, the control of a general partner given him by the written limited partnership agreement, where the gifts were made by delivered and recorded deeds and assignments conditioned on the consent of the guardianship Court to the investment of the gift property in a limited partnership and such consent was given, where the property given by Russell Giffen to each

of four children was an undivided one-sixteenth of a one-half interest in valuable farming land and equipment subject to that proportion of a heavy indebtedness and where Federal and California gift tax returns were filed and gift tax was paid?

STATUTES INVOLVED.

The statutes involved are Sections 22(a), 181 and 182 of the Internal Revenue Code, which Sections are printed in the Appendix hereof.

STATEMENT OF THE CASE.

The pertinent facts must be briefly stated. They are not in dispute:

Petitioners, Russell Giffen and Ruth P. Giffen, are husband and wife and have always been residents of the State of California (R. 193). They are the parents of four children, two boys and two girls (R. 193).

On October 14, 1941, Petitioners were engaged in farming approximately 18,500 acres of owned land and 16,500 acres of leased land from which they produced mainly cotton, flax, wheat and barley (R. 84, 85, 200, 201). In the farming of that land they employed 53 deep water wells and pumps, 14 tractors, 10 automobiles and trucks, 15 grain harvesters, 251 pieces of other farm equipment and 6 butane, diesel and water storage tanks (R. 84, 85, 200, 201). At that

time all of this farming property was owned by Petitioners as tenants in common in equal shares, pursuant to property agreements previously entered into by them on July 3, 1941, whereby they had transmitted all of their farming property from property held as equally co-owned community property to property held as tenants in common in equal shares (R. 194, 195).

On October 14, 1941, Ruth Giffen was appointed guardian of the estates of the four children whose ages were then approximately 16, 15, 14 and 13, respectively (R. 193, 197). On the same day each Petitioner transferred by written assignment of gift to each of the four children one-sixteenth of his and her undivided one-half interest in the foregoing described farming property subject to a like proportion of the outstanding liabilities (Stip. Sec. 3 at R. 189; R. 197). The gifts were made subject to the approval by the guardianship Court of the investment of the gifts in a limited partnership and that approval was given by the Court on October 15, 1941 (R. 197). Thereafter, Petitioners each filed a gift tax return reporting the transfers to the children, and paid a gift tax thereon (R. 198). The gift tax returns as adjusted upon audit reflected a gross fair market value of $2,183,885.47 for all of the farming assets subject to liabilities of $1,305,942.18 (Res. Ex. D, E, V, W). The net value of the combined gifts to the four children amounted to $219,485.88 (Res. Ex. D, E, V, W).

Following the making of the gifts to the children a limited partnership doing business under the name of Russell Giffen & Company was formed among Russell Giffen, as general partner, and Ruth Giffen and the four children, as limited partners (R. 198). The contributions of the children to the partnership were their respective one-sixteenth interests in the farming property and the contributions of the Petitioners were their respective six-sixteenth interests in the farming property (R. 198). By the terms of the partnership agreement the shares of net income of the partners were in proportion to their capital contributions except that Russell Giffen, as general partner, was first entitled to receive a salary of $25,000.00 per year for his personal services (R. 198, 199).

None of the limited partners rendered any services in the partnership business (R. 200) but by the terms of the partnership agreement Russell Giffen as general partner was required to manage the partnership business (R. 199). The only income withdrawn by the limited partners was amounts necessary to pay their income taxes (R. 201). None of the shares of income of the children was ever used to discharge Petitioners' parental obligation of support and education to the children (R. 202).

The limited partnership adopted a fiscal year accounting period ending March 31 and filed partnership returns on that basis in 1942, 1943 and 1944 (R. 200). Petitioners continued to file their individual

income tax returns on a calendar year basis as they had always previously done (Stip. Sec. 17 at R. 189).

Respondent determined that the shares of net income of the children from the partnership should be taxed to Petitioners and assessed deficiencies totaling $319,761.27 in Federal individual income and victory taxes against Petitioners for the years 1943 and 1944 (R. 21, 202, 203, 251). Petitioners applied to the Tax Court for redetermination (R. 4, 235) and the Tax Court held that Petitioners did not really and truly intend to join together with their children in bona fide partnership; that Petitioners' gifts to their children were not absolute and complete; and that none of the income was taxable to the children as partners or as owners of income-producing property. On appeal the Court of Appeals for the Ninth Circuit affirmed the Tax Court.

SPECIFICATIONS OF ERROR TO BE URGED.

The Court of Appeals erred:

1. In holding that the gifts of Petitioner, Ruth P. Giffen, to her four children were conditional and incomplete;

2. In holding that the gifts of Petitioner, Russell Giffen, to his four children were conditional and incomplete;

3. In holding that the children acquired no interest in the farming property which would require income

to be taxed to them as owners of income-producing property after personal service of others has first been compensated;

4. In holding that the partnership of Russell Giffen & Company should not be recognized for Federal income tax purposes as to the children of Petitioners;

5. Alternatively, in holding that there was a partnership between Petitioners alone and without the children for the purpose of computing net income from the farming business on a fiscal year accounting period rather than on the individual calendar year accounting period of the Petitioners.[1]

REASONS FOR GRANTING THE WRIT.

1. The decision below in failing to recognize that the gifts to the children were sufficiently complete for the children and not Petitioners to be taxed on the income earned by the donated property is in conflict with the following decisions of other Circuits:

The Court of Appeals for the Fifth Circuit held the income taxable to the donee child in *Alexander v. Commissioner,* 190 F. (2d) 753 (5th Cir., 1951). There, parents, who were engaged in farming and ranching, made gifts of cattle and later land to their minor son over a period of years starting when he was eight years of age and extending up to the year

[1]This point is preserved for argument on the merits if review is granted.

1943, the first year in issue, when the son was fourteen years of age. The son's cattle were grazed with the cattle of the parents primarily on the land of the parents but bore the son's own brand. Separate books and a separate bank account were maintained for the son by the father. All sales and financial transactions were either performed by or supervised by the father and the father lent his credit to financing transactions. The son performed service as a hand when he was at home but was gone 300 miles away at school during part of the tax years in issue. The parents paid all of the son's living expenses. The Tax Court held the income from the son's property was taxable to the father. The Court of Appeals reversed, holding that the income was earned by property which belonged to the son.

The Court of Appeals for the Tenth Circuit dealt with a similar situation in *Visintainer v. Commissioner*, 187 F. (2d) 519 (10th Cir., 1951). There, a father who was engaged in raising sheep gave several animals to each of his four children (one boy and three girls) whose ages were 6, 9, 11 and 13. The donated animals were marked with a paint brand for each child and were grazed with the father's flocks on the father's land. Bills of sale memorializing the transfers were executed and gift tax returns were filed. The father managed the business including the sale of the animals of the children. The mother kept ledger accounts of the business and set up ledger accounts for each of the children. A separate bank ac-

count of $100.00 was opened for the son when he became 16 years of age. Otherwise no separate bank account was opened for the children and no payment of funds was made to them; the amount due to them was credited in their ledger accounts. None of the children's money was used for their support. The children were all in school and performed no regular work on the ranch. The Tax Court held the income was taxable to the father but the Court of Appeals reversed, holding that the gifts were complete and the income therefrom was taxable to the children.

The Court of Appeals for the District of Columbia found a completed gift in the case of *Maiatico v. Commissioner,* 183 F. (2d) 836 (C.A.-D.C., 1950). There, the father was in the business, among others, of buying and improving real property. The mother persuaded him to make some provision for their four children, one son and three daughters whose ages were 10, 9, 8 and 6. The father set up a trust for each child and conveyed an undivided interest in some unimproved real property to the mother as trustee. He later also made available an interest in some improved real property. The father, the attorney and others besides the trustee for the children held interests in the property and a partnership was formed among them. The practice was to borrow money to improve property and pay off the indebtedness with the earnings. The only earnings distributed to the trustee were amounts necessary to pay income taxes. The father and the attorney handled the business for the partner-

ship and were paid a small salary. The Tax Court held the income was taxable to the father. The Court of Appeals reversed.

The Court of Appeals for the Eighth Circuit dealt with gifts of interests in a punch board manufacturing business in the case of *Walsh v. Commissioner*, 170 F. (2d) 535 (8th Cir., 1948). A father, mother and son were engaged in the business of manufacturing and selling punch boards. The son had only a working interest and when the father died he left the entire business to the mother. Immediately following the father's death the mother became ill and thereupon made a gift of a one-quarter interest in the business to her son, one-quarter to his wife and one-quarter to the son's one year old child. The mother had previously been active in the business but thereafter performed little or no service and the son managed the business. The wife and child took no part in the conduct of the business. The mother filed gift tax returns. The son was guardian of the estate of his child. The Tax Court held the son was a partner only as to a one-third interest and the wife and child were not to be recognized at all. The Court of Appeals reversed and held the partnership valid as to all partners for income tax purposes; i.e., the gift was complete even as to the one year old child.

It is apparent from the facts and holdings of the foregoing cases that there is a clear conflict as a matter of law between the Court below and the Courts of other Circuits as to what constitutes a completed

gift for income tax purposes. In each of the foregoing cases, as in the instant case, gifts of valuable property were made by parents or grandparents to minor children. The children in the other cases were all younger in each instance than those in the instant case. The property given in each case was income-producing in nature. That is particularly true of farming property of the kind involved in the instant case. The factor of personal service by the parent was eliminated by payment of compensation in the instant case and in the *Maiatico* and *Walsh* cases. In the foregoing cases and in the instant case gift tax returns were filed and in most instances gift tax was paid. (In the instant case additional gift tax was assessed on audit.) The share of income of the children was not used for their support or education in the foregoing cases or in the instant case. In all of these cases the share of income of the child was credited to his account with little or none of such income being distributed to the child except to the extent necessary to pay income taxes. In the *Maiatico* case, as in the instant case, the income of the children was used to discharge the indebtedness against their share of the property.

The foregoing comparison of these cases demonstrates a clear conflict as to what constitutes a completed gift. Moreover, it demonstrates particularly the misapprehension of the Court below as to gift completeness in the presence of the partnership relationship. The sufficiency of completeness of the gift

when the mantle of partnership is thrown over the shoulders of the donor and donee cannot be subject to a different test than when the partnership mantle is not assumed—the economic realities under Section 22(a) of the Internal Revenue Code as to the production of the income are ultimate in either situation.

The Tax Court below held the gifts incomplete because the guardianship Court's consent to investment in a limited partnership was required.[2] The Tax Court thus ignored the fact the consent was given and the gifts thereon became complete and irrevocable. The Tax Court's theory, to the extent adopted by the Appellate Court below, is in conflict with treatment of the substance of the donative relationship and subsequent managerial relationship between the donor parent and donee child in the *Alexander, Visintainer* and *Maiatico* cases. The Appellate Court below found the gifts incomplete apparently because of the indebtedness to which the gift property was subject saying, "the property was under indebtedness which overcame its present value." That position goes beyond and is in flagrant disregard of the record in which a total net value of the gifts to children for gift tax purposes is established at $219,485.88 (Res.

[2]There was a risk the guardianship court wouldn't consent to investment of a ward's property in a speculative farming business. The incidence of income tax liability doesn't fall as a penalty on the donor for trying to give property to the donee in a manner which the donor thinks best benefits the donee; it falls as a penalty on the donor who tries to have his cake and eat it too by purportedly giving and actually retaining at one and the same time.

Ex. D, E, V, W).[3] In substance, the holding of the Court below is that a donor cannot make a completed gift for income tax purposes of his equity in property which is what a donor does when he, as the mother did in the *Walsh* case, makes a gift of an interest in a going business.

2. It is important that the Court grant certiorari in this case because the pleadings frame an issue on which the Court has made no previous pronouncement and on which guidance is needed under the law *both prior to and subsequent to* the Revenue Act of 1951.

In the family partnership cases which have heretofore been before this Court the Court has been concerned solely with the reality of the partnership as such under Sections 181 and 182 of the Internal Revenue Code and such reality was made to depend upon the bona fides of the partnership relationship as disclosed by all relevant facts. If the relationship was found to be not bona fide then the division of income provided by the partnership agreement was rejected. But the question of whether, despite partnership invalidity, the income should nevertheless be allocated so as to attribute to the owner of capital the income derived from capital and to the executive, the earnings from his personal service, has never been passed

[3]The completeness of the gift for gift tax purposes may not be conclusive as to completeness for income tax purposes but the value of the gift for gift tax purposes should be conclusive as to value for income tax purposes.

upon. In *Culbertson v. Commissioner*, 337 U.S. 733 (1949), the Court expressly stated that,

> "No question as to the allocation of income between capital and services is presented in this case and we intimate no opinion on this subject." (337 U.S. 733, 748).

It has long been settled law under Internal Revenue Code Section 22(a) that income attributable to capital will be taxed to the true owner of the capital. Donative transfers have not been recognized where the donor retained the substance of ownership. This doctrine has had wide application to transfers in trust but confusion has resulted in partnership cases because the preliminary necessity of determining the validity of the partnership relationship *qua* partnership has been considered by some Courts to be the only issue to be decided.

Because of its concern over the failure of some lower Court decisions to give recognition to ownership of capital in the partnership context in harmony with well settled principles,[4] Congress has amended

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[4]The pertinent comments of the Senate Finance Committee on this point are as follows:

> "Section 339 of your committee's bill is intended to harmonize the rules governing interests in the so-called family partnership with those generally applicable to other forms of property or business. Two principles governing attribution of income have long been accepted as basic: (1) income from property is attributable to the owner of the property; (2) income from personal services is attributable to the person rendering the services. There is no reason for applying different principles to partnership income. If an individual makes a bona fide gift of real estate, or of a share of corporate

the Internal Revenue Code in pertinent part as follows:

"(a) Definition of Partner.—Section 3797(a) (2) is hereby amended by adding at the end thereof the following: 'A person shall be recognized as a partner for income tax purposes if he owns a capital interest in a partnership in which capital is a material income-producing factor, whether or not such interest was derived by purchase or gift from any other person.'

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stock, the rent or dividend income is taxable to the donee. Your committee's amendment makes it clear that, however, the owner of a partnership interest may have acquired such interest, the income is taxable to the owner, if he is the real owner. If the ownership is real, it does not matter what motivated the transfer to him or whether the business benefited from the entrance of the new partner.

Although there is no basis under existing statutes for any different treatment of partnership interests, some decisions in this field have ignored the principle that income from property is to be taxed to the owner of the property. Many court decisions since the decision of the Supreme Court in *Commissioner v. Culbertson* (337 U.S. 733) have held invalid for tax purposes family partnerships which arose by virtue of a gift of a partnership interest from one member of a family to another, where the donee performed no vital services for the partnership. Some of these cases apparently proceed upon the theory that a partnership cannot be valid for tax purposes unless the intrafamily gift of capital is motivated by a desire to benefit the partnership business. Others seem to assume that a gift of a partnership interest is not complete because the donor contemplates the continued participation in the business of the donated capital. However, the frequency with which the Tax Court, since the *Culbertson* decision, has held invalid family partnerships based upon donations of capital, would seem to indicate that, although the opinions often refer to 'intention' business purpose; 'reality', and 'control', they have in practical effect reached results which suggest that an intrafamily gift of a partnership interest, where the donee performs no substantial services, will not usually be the basis of a valid partnership for tax purposes. We are informed that the settlement of many cases in the field is being held up by the reliance of the field offices of the Bureau of Internal Revenue upon some such theory." (Senate Report No. 181, 82nd Congress, 1st Session, p. 26, Sept. 18, 1951.)

"(b) Allocation of Partnership Income.—Supplement F of chapter 1 is hereby amended by adding at the end thereof the following new section:

'Section 191. Family Partnerships.

'In the case of any partnership interest created by gift, the distributive share of the donee under the partnership agreement shall be includible in his gross income, except to the extent that such share is determined without allowance of reasonable compensation for services rendered to the partnership by the donor, and except to the extent that the portion of such share attributable to donated capital is proportionately greater than the share of the donor attributable to the donor's capital. The distributive share of a partner in the earnings of the partnership shall not be diminished because of absence due to military service. For the purpose of this section, an interest purchased by one member of a family from another shall be considered to be created by gift from the seller, and the fair market value of the purchased interest shall be considered to be donated capital. The "family" of any individual shall include only his spouse, ancestors, and lineal descendants, and any trust for the primary benefit of such persons.'

"(c) Effective Date.—The amendments made by this section shall be applicable with respect to taxable years beginning after December 31, 1950. The determination as to whether a person shall be recognized as a partner for income tax purposes for any taxable year beginning before January 1, 1951, shall be made as if this section had not been enacted and without inferences drawn

from the fact that this section is not expressly made applicable with respect to taxable years beginning before January 1, 1951 * * *"

Under the law applying prior to this amendment this Court has not provided guideposts for determining:

1. When in the family partnership relationship has there been a sufficient divestment of control by a donor to vest ownership of capital in a donee so that income which is attributable to ownership of capital and which is not attributable to donor's personal services must, under statutory and constitutional principles, be taxed to the donee?

2. What are the standards to be used in determining the proportion of income allocable to capital as distinguished from personal services?

These questions must be answered in order to know what the law was prior to the 1951 amendments and what the law will be under the 1951 amendments. The issues necessary to the determination of these questions have been framed by the pleadings and the instant case factually offers an unusual opportunity for definition of principles to be applied because of the undisputed factual situations:

The gift property in the instant case was, prior to the gifts, held and owned by Petitioners, one-half as the separate property of each of them. The mother, Ruth P. Giffen, exercising her freedom to give away her own separate property, made gifts to her children out of her one-half interest. She then became a limited

partner as did each of the donee children, each contributing to capital their respective undivided interests in the property. As a limited partner the mother retained no dominion or control over what she gave away; with respect to what she gave the children the situation was the same as if she had died and left the property to the children by inheritance.

The father, Russell Giffen, also exercised his freedom to give away part of his separate property to his children. After he made his gifts he became the general partner in the limited partnership that was formed. As the general partner he was the manager of the business and, therefore, did have, after the gifts were made, some control of what he had given away; he had retained some control.

As the general manager and only non-employee person rendering personal service to the partnership the father was paid a salary of $25,000.00 a year. After the payment to the father of that salary for his personal services, the balance of partnership income was, by the partnership agreement, allocated to the partners in the proportion in which they owned the capital, namely, six-sixteenths for each Petitioner and one-sixteenth for each donee child. Both the services of the father and the property involved were material income producing factors.

On this factual situation it will be possible for this Court to resolve the conflicts and confusion in the Courts below by establishing whether gift completeness has been achieved in a partnership when mana-

gerial rights have been reserved as in this case with respect to the father's gifts or whether such completeness occurs in partnership only if all control has been given up as in this case with respect to the mother's gifts.

If even the mother's gifts in the instant case are held inadequate to shift to the children the burden of income tax on the income from the property they were given by her, then the pronouncement of this Court on this point is of vital importance for all tax years before and after the new amendments because the decision of the Court below in effect establishes a more severe test for gifts in partnership than in other contexts. Since the mother here gave up all dominion and control, the holding of the Court below as to her gifts wholly abandons the retention-of-control test under Section 22(a) of the Internal Revenue Code, as enunciated by this Court in *Helvering v. Clifford,* 309 U.S. 331 (1940) and related cases. In that important respect the instant decision is in conflict with the pronouncement of this Court and it is also in clear conflict with the *Walsh* and *Maiatico* cases.

Finally, if the ownership of the property by the children, in whole or in part, is recognized but the validity of the partnership is denied, then there has been framed in the issues by the pleadings in this case (R. 6, 28, 237, 259) the question of allocating, between capital and service, the income attributable to each under Internal Revenue Code Section 22(a)

irrespective of partnership agreement as to such allocation. This point has never before been presented to this Court and is of extreme importance not only for tax years prior to the new amendment but also for tax years thereafter because of the terms of the new amendment. The Tax Court failed to make the findings requested by Petitioners on this issue and it is respectfully submitted that this Court should grant review to determine what standards shall be used to determine the proportion of income attributable to capital and service and should remand for findings in accordance with such standards.

CONCLUSION.

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Dated, Fresno, California,
November 16, 1951.

Respectfully submitted,
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(Appendix Follows.)

Appendix

Internal Revenue Code

Sec. 22(a) (26 U.S.C.A. Sec. 22(a)):

Gross Income—General Definition.

"(a) General Definition.—'Gross income' includes gains, profits, and income derived from salaries, wages, or compensation for personal service (including personal service as an officer or employee of a State, or any political subdivision thereof, or any agency or instrumentality of any one or more of the foregoing), of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever. In the case of Presidents of the United States and judges of courts of the United States taking office after June 6, 1932, the compensation received as such shall be included in gross income; and all Acts fixing the compensation of such Presidents and judges are hereby amended accordingly. In the case of judges of courts of the United States who took office on or before June 6, 1932, the compensation received as such shall be included in gross income."

Sec. 181 (26 U.S.C.A. Sec. 181):

Partnership Not Taxable.

"Individuals carrying on business in partnership shall be liable for income tax only in their individual capacity."

Sec. 182 (26 U.S.C.A. Sec. 182):

Tax of Partners.

"In computing the net income of each partner, he shall include, whether or not distribution is made to him—

"(a) As part of his gains and losses from sales or exchanges of capital assets held for not more than 6 months, his distributive share of the gains and losses of the partnership from sales or exchanges of capital assets held for not more than 6 months.

"(b) As part of his gains and losses from sales or exchanges of capital assets held for more than 6 months, his distributive share of the gains and losses of the partnership from sales or exchanges of capital assets held for more than 6 months.

"(c) His distributive share of the ordinary net income or the ordinary net loss of the partnership, computed as provided in section 183(b)."

Revenue Act of 1951

Sec. 340. Family Partnerships.

"(a) Definition of Partner.—Section 3797(a)(2) is hereby amended by adding at the end thereof the following: 'A person shall be recog-

nized as a partner for income tax purposes if he owns a capital interest in a partnership in which capital is a material income-producing factor, whether or not such interest was derived by purchase or gift from any other person.'

"(b) Allocation of Partnership Income.—Supplement F of chapter 1 is hereby amended by adding at the end thereof the following new section:

'Sec. 191. Family Partnerships.

'In the case of any partnership interest created by gift, the distributive share of the donee under the partnership agreement shall be includible in his gross income, except to the extent that such share is determined without allowance of reasonable compensation for services rendered to the partnership by the donor, and except to the extent that the portion of such share attributable to donated capital is proportionately greater than the share of the donor attributable to the donor's capital. The distributive share of a partner in the earnings of the partnership shall not be diminished because of absence due to military service. For the purpose of this section, an interest purchased by one member of a family from another shall be considered to be created by gift from the seller, and the fair market value of the purchased interest shall be considered to be donated capital. The "family" of any individual shall include only his spouse, ancestors, and lineal descendants, and any trust for the primary benefit of such persons.'

"(c) Effective Date.—The amendments made by this section shall be applicable with respect to taxable years beginning after December 31, 1950. The determination as to whether a person shall be recognized as a partner for income tax purposes for any taxable year beginning before January 1, 1951, shall be made as if this section had not been enacted and without inferences drawn from the fact that this section is not expressly made applicable with respect to taxable years beginning before January 1, 1951. In applying this subsection where the taxable year of any family partner is different from the taxable year of the partnership—

(1) if a taxable year of the partnership beginning in 1950 ends within or with, as to all of the family partners, taxable years which begin in 1951, then the amendments made by this section shall be applicable with respect to all distributive shares of income derived by the family partners from such taxable year of the partnership beginning in 1950, and

(2) if a taxable year of the partnership ending in 1951 ends within or with a taxable year of any family partner which began in 1950, then the amendments made by this section shall not be applicable with respect to any of the distributive shares of income derived by the family partners from such taxable year of the partnership."

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In the Supreme Court of the United States

OCTOBER TERM, 1951

No. 433

RUSSELL GIFFEN AND RUTH P. GIFFEN, PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The findings of fact and opinion of the Tax Court (R. 191-211) are reported at 14 T.C. 1272. The opinion of the Court of Appeals (R. 286-291) is reported in 190 F. 2d 188.

JURISDICTION

The judgments of the Court of Appeals for the Ninth Circuit were entered on June 22, 1951. (R. 292, 293.) A petition for rehearing filed on July

17, 1951, was denied on August 23, 1951. (R. 294.) The petition for a writ of certiorari was filed on November 19, 1951. The jurisdiction of this Court is invoked under the provisions of 28 U.S.C., Section 1254.

QUESTIONS PRESENTED

1. Whether the Court of Appeals properly affirmed the Tax Court's determination that taxpayers' children were not bona fide partners with taxpayers in the farming operations of Russell Giffen & Company.

2. Whether the Court of Appeals properly affirmed the Tax Court's determination that the purported gifts of portions of the farm property from taxpayers to their children were not sufficiently complete to require the taxation to the children of the income from the portions of the farm property allegedly transferred.

STATUTES INVOLVED

Internal Revenue Code:

SEC. 22. GROSS INCOME.

(a) *General Definition.*—"Gross income" includes gains, profits, and income derived from salaries, wages, or compensation for personal service, of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; also from interest, rent, dividends, securities, or the transaction

of any business carried on for gain or profit, or gains or profits and income derived from any source whatever. * * *

(26 U.S.C. 1946 ed., Sec. 22.)

* * * * *

SEC. 191 [As added by Section 340 (b) of the Revenue Act of 1951, Public Law 183, 82d Cong., 1st Sess.]. FAMILY PARTNERSHIPS.

In the case of any partnership interest created by gift, the distributive share of the donee under the partnership agreement shall be includible in his gross income, except to the extent that such share is determined without allowance of reasonable compensation for services rendered to the partnership by the donor, and except to the extent that the portion of such share attributable to donated capital is proportionately greater than the share of the donor attributable to the donor's capital. * * * For the purpose of this section, an interest purchased by one member of a family from another shall be considered to be created by gift from the seller, and the fair market value of the purchased interest shall be considered to be donated capital. The "family" of any individual shall include only his spouse, ancestors, and lineal descendants, and any trust for the primary benefit of such persons.

Revenue Act of 1951, Public Law 183, 82d Cong., 1st Sess.:

SEC. 340. FAMILY PARTNERSHIPS.

* * * * *

(c) *Effective Date.*—The amendments made by this section shall be applicable with respect to taxable years beginning after December 31, 1950. The determination as to whether a person shall be recognized as a partner for income tax purposes for any taxable year beginning before January 1, 1951, shall be made as if this section had not been enacted and without inferences drawn from the fact that this section is not expressly made applicable with respect to taxable years beginning before January 1, 1951. * * *

STATEMENT

The material facts as found by the Tax Court (R. 193-203) may be summarized as follows:

Taxpayers, Russell Giffen and Ruth P. Giffen, are husband and wife and have always been residents of the State of California. (R. 193.) They are parents of four children who were minors during the taxable years. (R. 193.)

On October 14, 1941, taxpayers were engaged in farming approximately 13,500 acres of owned land and 16,500 acres of leased land from which they produced mainly cotton, flax, wheat and barley. In the farming of that land they employed various equipment. (R. 84-85, 200-201.) At that time all of the farming property and equipment was owned by taxpayers as tenants in common in equal shares, pursuant to property agreements previously entered into by them on July 3, 1941, whereby they had transmitted all of their farming property from

property held as equally co-owned community property to property held as tenants in common in equal shares. (R. 194-195.)

On October 14, 1941, Ruth Giffen was appointed guardian of the estates of the four children. (R. 193, 197.) On the same day each taxpayer transferred by written assignment of gift to each of the four children one-sixteenth of his and her undivided one-half interest in the foregoing described farming property subject to a like proportion of the outstanding liabilities. (Stip. par. 3, R. 183; R. 197.) The gifts were made subject to the approval by the guardianship court of the investment of the gifts in a limited partnership and that approval was given by the court on October 15, 1941. (R. 197.) Thereafter, taxpayers each filed a gift tax return reporting the transfers to the children, and paid a gift tax thereon. (R. 198.)

On October 15, 1941, Russell Giffen, Ruth Giffen for herself individually, and their four minor children severally by their guardian Ruth Giffen executed a certificate of limited partnership, reflecting formation of a limited partnership doing business under the name of Russell Giffen & Company. On the same day other papers necessary for formation of a limited partnership in California were executed, published and recorded. (R. 198.)

The partnership agreement named Russell Giffen as general partner and his wife and children as limited partners. It stated that the assets of the partnership were to consist of the assets of the ten-

ancy in common of Russell and Ruth Giffen subject to the liabilities outstanding against them. Six-sixteenths of the capital was stated to be the contribution of Russell Giffen while a like proportion constituted the contribution of his wife. It set forth that each child contributed one-sixteenth of the capital and thereby was entitled to one-sixteenth interest therein. Both Russell and Ruth Giffen were entitled to six-sixteenths of the net income of the partnership, while each child was entitled to one-sixteenth thereof. No income was to be distributed to either a general or limited partner in the event this would impair the capital of the partnership or jeopardize the interest of a partnership creditor. Russell Giffen, as general partner, was entitled to a salary of $25,000 per year in addition to his right to share in the partnership net income. The general partner was given full power to conduct the business of the partnership as general manager. He further was authorized to reinvest in the partnership such net income of the partners as he in his sole discretion deemed advisable or to withhold such income from the partners and accumulate it in the partnership for future investment or distribution. Losses were to be borne ratably but no limited partner was to be liable for loss beyond his capital contribution. A limited partner was denied the right to assign his interest in the limited partnership. In the event of the death of any limited partner the agreement

stated that the partnership should automatically be dissolved and the general partner purchase the decedent's share at its appraised valuc. Finally the agreement provided that at any time the general partner was entitled to purchase the interest of any limited partner for cash at the appraised value of such interest. (R. 198-199.)

Prior to the purported transfers by taxpayers to their children, the "partnership agreement" was submitted to Anderson-Clayton Company, which had loaned money on the farming enterprise, for its approval. Anderson-Clayton Company's approval was necessary not only because of present indebtedness owed it but because of future financing which would be necessary. Consent to the proposed partnership was given upon the promise of Russell Giffen that all the net income of the partnership would be retained and applied in reduction of indebtedness to Anderson-Clayton Company until it was paid off, and because under the agreement full management control was vested in Russell Giffen. (R. 197.)

The partnership business was carried on in its name, Russell Giffen & Company. At no time from October 15, 1941, through March 31, 1944, did Ruth Giffen or any of the children render vital services to Russell Giffen & Company or take part in its management and control. Russell Giffen alone determined all policies and managed all the farming

operations and dealt with the partnership net income as he saw fit. (R. 200-201.)

The only partnership income the limited partners were permitted to withdraw during the taxable years under consideration was to enable them to pay income taxes on the profits credited to them on the books of Russell Giffen & Company. The limited partners were not allowed to withdraw any greater portion of income credited to them because the partnership remained indebted to Anderson-Clayton Company at all times from October 15, 1941, through March 31, 1944. (R. 201-202.)

On the basis of these subsidiary findings, the Tax Court made the following ultimate findings:

The purported gifts by Russell and Ruth Giffen to their four children were not complete and absolute but were made on condition that the property remain in the farm business and under the absolute management and control of taxpayer Russell Giffen in respect of both capital and income therefrom. (R. 203.)

The income realized by Russell Giffen & Company from October 15, 1941, to March 31, 1944, resulted both from the capital contributions of each taxpayer and from services performed by Russell Giffen. (R. 203.)

Taxpayers did not really and truly intend to join together with their four children in the conduct of the business of Russell Giffen & Company as a bona

fide partnership at any time from October 15, 1941, through March 31, 1944. (R. 203.)

The judgment of the Tax Court which followed from these findings, sustaining the deficiency assessments, was affirmed by the Court of Appeals. (R. 286-291.)

ARGUMENT

1. This is a family partnership case which presents no more occasion for further review than have similar cases in which certiorari has recently been denied.[1] Taxpayers' contention that their children were members of a farming partnership known as Russell Giffen & Company is premised upon the purported contribution by each of the four children to the partnership of a one-sixteenth interest in the farm property which theretofore had allegedly been transferred from taxpayers to the children.[2] The Tax Court found (R. 203) that "The purported gifts by Russell and Ruth Giffen to their four children were not complete and absolute * * *", and refused to recognize the children as partners because the "children made no contribution of capital to Russell Giffen and Company" (R. 205).

The decision of the Tax Court, which was af-

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[1] *Bentley* v. *Commissioner*, 184 F. 2d 668 (C.A. 2d), certiorari denied, 340 U.S. 943; *Anderson* v. *Commissioner*, 185 F. 2d 1021 (C.A. 2d), certiorari denied, 341 U.S. 935; *Batman* v. *Commissioner*, 189 F. 2d 107 (C.A. 5), certiorari denied November 13, 1951, No. 339, this Term.

[2] There was no contention that the children contributed any services to the partnership.

firmed by the Court of Appeals, is in accord with the established principle that an anticipatory assignment of income, whatever its formal cloak, is ineffective taxwise. The principle applies whether the income in question is derived from services (*Lucas* v. *Earl*, 281 U.S. 111; *Helvering* v. *Eubank*, 311 U.S. 122), or from property (*Commissioner* v. *Sunnen*, 333 U.S. 591; *Harrison* v. *Schaffner*, 312 U.S. 579; *Helvering* v. *Horst*, 311 U.S. 112; *Helvering* v. *Clifford*, 309 U.S. 331), or from a blend of both sources (*Commissioner* v. *Tower*, 327 U.S. 280; *Lusthaus* v. *Commissioner*, 327 U.S. 293; *Commissioner* v. *Culbertson*, 337 U.S. 733).

In its findings of fact, which were in every respect supported by the evidence, the Tax Court found, *inter alia*, (R. 196-201) that taxpayers "desired to give their sons and daughters separate parcels of the farming property, but it was impossible to convey such independent estates to them at that time due to the fact all the property was encumbered with indebtedness owing to Anderson-Clayton Company"; that Anderson-Clayton Company consented to the proposed partnership "upon the promise of Russell Giffen that all the net income of the partnership would be retained and applied in reduction of indebtedness" to that company; that "The transfers were expressly conditioned upon an order by the court having jurisdiction over the estate of each child authorizing Ruth

Giffen [the guardian of the estates of taxpayers' four minor children] to accept the gifts on their behalf, to invest the gifts in the limited partnership and to execute the articles of limited co-partnership on their behalf"; that "The general partner [taxpayer Russell Giffen] was given full power to conduct the business of the partnership"; that "He further was authorized to reinvest in the partnership such net income of the partners as he in his sole discretion deemed advisable or to withhold such income from the partners and accumulate it in the partnership for future investment or distribution"; that "A limited partner [the children were limited partners] was denied the right to assign his interest in the limited partnership"; that "at any time the general partner was entitled to purchase the interest of any limited partner for cash at the appraised value of such interest"; that "Russell Giffen alone determined all policies and managed all the farming operations and dealt with the partnership net income as he saw fit"; and that "The only partnership income the limited partners were permitted to withdraw during the taxable years under consideration was to enable them to pay income taxes on the profits credited to them on the books of Russell Giffen and Company".

Viewed in the light of the principles enunciated in *Commissioner* v. *Culbertson, supra,* the foregoing facts clearly support the trial court's ulti-

mate finding, concurred in by the court of appeals, that "Petitioners did not really and truly intend to join together with their four children in the conduct of the business of Russell Giffen and Company as a bona fide partnership * * *." (R. 203.)

2. Taxpayers make a second contention that, even if the children were not partners for tax purposes, one-sixteenth of the income of Russell Giffen & Company was taxable to each child, as an owner of that portion of the capital invested in the partnership, and that the failure of the courts below to uphold that contention results in conflict with decisions of other circuits.[3] But the finding of both courts below is that the children were not "owners" in any real sense. That was not true in any of the cases relied upon as establishing a conflict. Here, as the court of appeals pointed out, "Any interest which any one of [the children] had was conditional and evanescent". (R. 289.)

Finally, the amendments to the partnership provisions of the Internal Revenue Code made by Section 340 of the Revenue Act of 1951, adding Section 191 to the Code, (*supra*, p. 3), do not affect the decision below. Section 340, which creates new standards for the future determination of whether a

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[3] *Alexander* v. *Commissioner*, 190 F. 2d 753 (C.A. 5th) (Br. 8-9); *Visintainer* v. *Commissioner*, 187 F. 2d 519 (C.A. 10th), certiorari denied, No. 219, this Term (Br. 9-10); *Maiatico* v. *Commissioner*, 183 F. 2d 836 (C.A. D.C.) (Br. 10-11); *Walsh* v. *Commissioner*, 170 F. 2d 535 (C.A. 8th) (Br. 11).

partnership status exists, specifically provides in subsection (c) that—

> The amendments made by this section shall be applicable with respect to taxable years beginning after December 31, 1950. The determination as to whether a person shall be recognized as a partner for income tax purposes for any taxable year beginning before January 1, 1951, shall be made as if this section had not been enacted and without inferences drawn from the fact that this section is not expressly made applicable with respect to taxable years beginning before January 1, 1951. * * *

CONCLUSION

Accordingly, there is no circumstance present in this case which warrants the granting of certiorari, and the petition should be denied.

Respectfully submitted,

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In the Supreme Court
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United States

OCTOBER TERM, 1951

No. 433

RUSSELL GIFFEN,
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and
RUTH P. GIFFEN,
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vs.
COMMISSIONER OF INTERNAL REVENUE,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

REPLY BRIEF FOR PETITIONERS.

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On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

REPLY BRIEF FOR PETITIONERS.

ARGUMENT IN REPLY.

ANSWERING RESPONDENT'S ARGUMENT THAT TAXPAYERS HAVE NOT SHOWN A CONFLICT WITH DECISIONS OF OTHER CIRCUITS.

The argument on page 12 of respondent's brief misconceives the reason for the conflict between the holding below and decisions of other circuits.

Respondent claims there is no conflict because in the instant case the Courts below held the children were not "'owners' in any real sense". This argument actually proves there is a conflict.

The conflict exists because, as is undenied in respondent's brief, on facts which are in substance identical with those in the instant case Courts in other circuits[1] hold that the donees have become "owners" for income tax purposes. The contrary determination of that question of law by the Court below *creates* the conflict which forms the basis for taxpayers' petition for certiorari.

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[1] *Alexander v. Commissioner*, 190 F. (2d) 753 (C.A. 5th) (Br. 8-9); *Visintainer v. Commissioner*, 187 F. (2d) 519 (C.A. 10th), certiorari denied, No. 219, this Term (Br. 9-10); *Maiatico v. Commissioner*, 183 F. (2d) 836 (C.A. D.C.) (Br. 10-11); *Walsh v. Commissioner*, 170 F. (2d) 535 (C.A. 8th) (Br. 11).

CONCLUSION.

The petition for certiorari should be granted.

Dated, Fresno, California,
January 16, 1952.

Respectfully submitted,

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